Supreme Court, U.S.
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90-358

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director, Virgin Islands
Bureau of Internal Revenue,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether 49 U.S.C. sec. 1513(a), which expressly prohibits the Virgin Islands from levying gross receipts taxes "directly or indirectly . . . on the sale of air transportation," prohibits the Virgin Islands from imposing gross receipts taxes on air transportation sales by travel agencies.

PARTIES TO THE PROCEEDINGS BELOW

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IN THE

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OCTOBER TERM, 1990

No. —

TRAVEL SERVICES, INC.,
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v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director, Virgin Islands
Bureau of Internal Revenue,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 904 F.2d 186 and is printed in appendix "A." The opinion of the District Court of the Virgin Islands, Appellate Division, is reproduced in Appendix "B." The opinion of the Territorial Court of the Virgin Islands is reproduced in Appendix "C."

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 31, 1990. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

49 U.S.C. sec. 1513 provides in pertinent part:

> (a) No state (. . . including the Virgin Islands) shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom*; . . .
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

33 V.I.C. sec. 43(a) provides in pertinent part:

> Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report *their gross receipts and pay a tax of four percent (4%) on the gross receipts* of such business . . .

STATEMENT OF THE CASE

Petitioner is a travel agency doing business in the United States Virgin Islands. It sells, among other things, airline tickets. In its capacity as the seller of air transportation, petitioner is closely regulated and supervised by the airlines. Petitioner acts as an agent of the airlines, selling airline tickets solely under the terms and conditions set by the airlines.

Petitioner participates in the Agent Reporting Plan (ARP). Under this plan, petitioner deposits the proceeds of airline ticket sales into an account against which ARP has a right of withdrawal. ARP withdraws the proceeds on behalf of the airlines and leaves only the portion that represents petitioner's commissions.

By law, petitioner is required to sell airline tickets at the same price as those tickets are sold by the airlines

themselves. If a ticket is sold directly by an airline, the Virgin Islands Government levies no gross receipts tax on any portion of the sale. If the same ticket is sold at an identical price by a travel agent such as petitioner, the Virgin Islands Government contends that it is entitled to levy a gross receipts tax on the portion of the sale that is paid to the agency as its commission.

Pursuant to 33 V.I.C. sec. 43(a), petitioner filed monthly gross receipts tax returns for June 1983 through April 1986, omitting from those returns income representing commissions earned from selling air transportation. Petitioner excluded gross receipts from the sale of air transportation because of the plain language of 49 U.S.C. sec. 1513(a), which prohibits the levy of "a tax, fee, head charge, or other charge, directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom; . . ." The Virgin Islands Department of Internal Revenue disagreed and assessed a deficiency in the amount of the withheld gross receipts taxes.

Petitioner filed an action for redetermination of tax in the Territorial Court of the Virgin Islands, urging that 49 U.S.C. sec. 1513(a) preempted 33 V.I.C. sec. 43 (a) to the extent that the local statute attempted to impose a gross receipts tax on the sale of air transportation. Petitioner advanced three arguments. First, the plain wording of the Federal statute protected the act of selling air transportation, irrespective of whether the seller was an airline or an agent of the airline. Second, Congress' intent in enacting 49 U.S.C. sec. 1513(a) was to protect the entire airline industry, not just airlines, from multiple taxes that would inhibit air travel. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983). Third, the policies of inexpensive air travel underlying the Airport Development Acceleration Act of which 49 U.S.C. sec. 1513(a) forms a part are

undermined if local entities can impose gross receipts taxes on travel agents for selling airline tickets. Since agents cannot charge higher prices than do airlines, the cost of added taxes must ultimately be passed on to the consumer in the form of higher ticket prices across the board.

The matter was submitted on cross-motions for summary judgment based on stipulated facts. (Appendix "D"). In Memorandum Opinion and Order dated June 23, 1988, the Territorial Court granted summary judgment in favor of the Virgin Islands Government, holding that 49 U.S.C. sec. 1513(a) did not prevent the local government from imposing a gross receipts tax on a travel agent's sale of air transportation because that sale constituted a "service" and not the sale of air transportation. On August 18, 1989, the District Court of the Virgin Islands, Appellate Division, affirmed the decision of the Territorial Court. That decision was in turn affirmed by the United States Court of Appeals for the Third Circuit on May 31, 1990.

REASONS FOR GRANTING WRIT

The narrow interpretation placed on 49 U.S.C. sec. 1513(a) by the Third Circuit is contrary to the plain wording of the statute and to existing precedent. It undermines the very policies that the statute was designed to foster. The impact of the Circuit's decision is of nationwide import. If the opinion is permitted to stand, states and municipalities will be permitted to impose gross receipts taxes on commissions derived from the sale of air transportation, inevitably resulting in higher ticket prices contrary to the scheme envisioned by Congress in the Airport Acceleration Act.

In reviewing 49 U.S.C. sec. 1513(a) in a related context, the Supreme Court observed: "When a Federal statute unambiguously forbids the States to impose a

particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted." *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 (1983). 49 U.S.C. 1513(a) is a model of clarity. By its plain wording, it protects the act of selling air transportation from gross receipts taxation. Taxes may not be collected "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom." The fallacy in the opinion below is its attempt to read into the statute the condition that the statute proects only air carriers themselves. Such is patently not the case, nor was it ever intended to be. See *Aloha Airlines v. Director of Taxation, supra*, 464 U.S. at 13.

Moreover, the legislative history of the statute is consistent with its plain meaning. Senator Pearson observed, "The committee bill prohibits State and local taxation of air fares . . ." 119 Cong. Record, part 3, pp. 3349-3350.

The Circuit erroneously concluded that taxing a travel agent's commissions derived from the sale of air transportation was not a tax on the sale of air transportation, but rather a tax on the sale of a "service" to airlines, and hence taxable under 49 U.S.C. sec. 1513(b). Such reasoning is, of course, obviously flawed, since the activity at issue here is the sale of air transportation. This is precisely the activity that the statute exempts from gross receipts taxation.

In effect, the Circuit affixed the label of "service" to petitioner's sale of air transportation, and then concluded that the new label rendered petitioner's sale of air transportation something other than what it really was. This is the identical mode of reasoning rejected by the Supreme Court in *Aloha Airlines v. Director of Taxation, supra.* There, Hawaii sought to tax the carriage of air

passengers by levying a "property tax" on airlines computed on gross receipts. The Supreme Court rejected this subterfuge for two reasons. First, even though Hawaii imposed the tax on air carriers instead of on air travelers, the reach of sec. 1513(a) was not so narrow: the statute "unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce . . ." Second, even though Hawaii styled its tax as a property tax, the Court looked to the effect of the tax and deemed it a gross receipts tax, and hence preempted. In sum, emphasized the Court, sec. 1513(a) was designed to protect the air travel industry. Local governments could not circumvent the law's reach simply by taxing different components of the industry or by calling taxes something other than what they really were. Accordingly, in the instant case, the fact that the Circuit chose to call petitioner's sale of air transportation a "service" in no way changes the reality of petitioner's activity. Petitioner sells air transportation and cannot be taxed on gross receipts derived from that activity.

Moreover, the Circuit's reasoning is at odds with judicial precedent which treats airline ticket sales by carriers as legally identical to airline ticket sales by travel agencies because of the close principal-agent relationship between the two. See *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (1989) and 806 F.2d 722 (1986), where the Seventh Circuit rejected the distinction between the sale of air travel service by a carrier directly or through an agency on the one hand, and their agency's reservation-ticketing activities on the other.

Existing case law draws a sharp distinction between "goods and services" that can be taxed under 49 U.S.C. sec. 1513(b) and the "sale of air transportation" that is protected under sec. 1513(a). The Supreme Court recently approved sales tax on fuel used by air carriers.

Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986). In a concurring opinion, Chief Justice Burger observed that section (b) was added to ensure that the statute would not "prohibit even unobjectionable taxes such as landing fees, fuel taxes and sales taxes on food provided to airline passengers." In like spirit, lower courts have sustained taxes on the sale of packaged meals to passengers, *Air Jamaica, Ltd. v. State Dept. of Revenue*, 374 So.2d 575 (Fla. App. 1979); on the sale of air freight transportation, State ex rel. *Arizona Dept. of Revenue v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (1980); and on the sale of fuel, In re *Manier*, Bankruptcy, N.D. Ohio 1986, 59 B.R. 588. See also, *Salem Transportation Co. v. Port Authority of New York and New Jersey*, 611 F. Supp. 254 (D.C.N.Y. 1985), finding that the sale of ground transportation is not protected under sec. 1513(a).

Until the Third Circuit's break with precedent in this case, however, no court had ever approved the levy of gross receipts taxes on the sale of air transportation. In striking down a privilege tax on air carrier ticket sales, the Supreme Court of Arizona emphasized that "the sales tax referred to in section 1513(b) on the sales of goods and services cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air commerce." State ex rel. *Arizona Department of Revenue v. Cochise Airlines, supra*, 626 P.2d at 601.

CONCLUSION

This is an appropriate case for Supreme Court review. The Third Circuit has construed a Federal statute contrary to its plain meaning and to its legislative history. The Circuit's construction is contrary to existing precedent and upsets a carefully drawn nationwide regulatory scheme. If permitted to stand, the Circuit's interpretation of 49 U.S.C. sec. 1513 will allow local governments

to impose taxes that will affect the price of airline travel with national consequences.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

Filed May 31, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3619

TRAVEL SERVICES, INC.,
Appellant

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director,
Virgin Islands
Bureau of Internal Revenue,
Appellees

Appeal from the District Court
of the Virgin Islands
Division of St. Croix,
Appellate Division
(D.C. Civil Action No. 88-264)

Argued: April 25, 1990

PRESENT: SLOVITER, STAPLETON and
HUTCHINSON, *Circuit Judges*

Opinion filed May 31, 1990

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

In this appeal we decide whether 49 U.S.C.A. § 1513(a) (West 1976) preempts a Virgin Islands' gross receipts tax on the commissions earned by travel agents for the sale of airline tickets. For the reasons stated below, we hold that § 1513(a) does not preempt such a tax.

I.

Appellant, Travel Services, Inc. (Travel Services), operates a travel agency in the United States Virgin Islands. Among its activities is the sale of airline tickets, as agent for various airlines, to persons wishing to fly to and from the Virgin Islands. It sells those tickets at the same price the airlines would charge and receives from them a commission. When it sells an airline ticket, Travel Services is required to deposit the fares into a

special account that it holds in trust for the airlines. The airlines draw funds from this account for the total fares less the commissions owed to Travel Services. The price of the airline ticket is established by the airlines and cannot be increased or decreased by Travel Services. The amount paid by a passenger is the same whether he or she purchases a ticket from Travel Services or directly from the air carrier.

The Virgin Islands gross receipts tax, set forth at V.I. Code Ann. tit. 33, § 43(a) (Supp. 1989-90), provides in relevant part:

> Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay a tax of four percent (4%) on the gross receipts of such business.

The United States Congress has enacted a statute concerning taxes levied on airline travel. That statute, set forth at 49 U.S.C.A. § 1513 (West 1976 & Supp. 1990),[1] reads in relevant part:

> (a) No State (or political subdivision thereof, including . . . the Virgin Islands . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> (b) . . . [N]othing in this section shall prohibit a State (or political subdivision thereof, including . . . the Virgin Islands . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes,

---

[1] For a discussion of the history behind the passage of 49 U.S.C.A. § 1513, see *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 8-10 (1983).

> net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . .

Travel Services filed tax returns for the period of June 1983 through April 1986, as required under the Virgin Islands statute, but did not include in its reported gross receipts the commissions it had earned on the sale of airline tickets. The Virgin Islands taxing authorities assessed gross receipts taxes and interest on Travel Services' commissions from the sale of airline tickets for the period of June 1983 through April 1986. Travel Services then brought an action in the Territorial Court of the Virgin Islands contending that the Virgin Islands' assessment of tax on the commissions it had earned from the sale of airline tickets was prohibited by 49 U.S.C.A. § 1513(a).

The parties filed stipulated facts and, on cross-motions for summary judgment, the territorial court denied Travel Services' motion and granted summary judgment to the government. The territorial court held that the tax imposed by the Virgin Islands statute was not a tax on gross receipts derived from the sale of air transportation preempted by 49 U.S.C.A. § 1513(a), but instead was a tax on services permitted by § 1513(b). The Appellate Division of the District Court of the Virgin Islands accepted the territorial court's reasoning and affirmed. This appeal followed.

II.

The territorial court had subject matter jurisdiction pursuant to V.I. Code Ann. tit. § 76(a) (Supp. 1989-90). The district court had appellate jurisdiction over Travel Services' appeal from the final judgment of the territorial court pursuant to 48 U.S.C.A. § 1613a(a) (West 1987), and V.I. Code Ann. tit. 4, § 33 (Supp. 1989-90). We have appellate jurisdiction over the final order of the district court. *See* 28 U.S.C.A. § 1291 (West Supp.

1990); 48 U.S.C.A. § 1613a(c) (West 1987). Since the issues the parties raise involve statutory construction, our scope of review is plenary. *See Chrysler Credit Corp. v. First Nat'l Bank & Trust Co.*, 746 F.2d 200, 202 (3d Cir. 1984).

III.

Section 1513(a) prohibits the Virgin Islands from "directly or indirectly" taxing gross receipts derived from the sale of air transportation. Travel Services contends § 1513(a) should be construed broadly to prohibit a tax on travel agency commissions paid from an airline's gross receipts. However, in § 1513(b) Congress limited the broad sweep of § 1513(a) by permitting states to impose "taxes other than those enumerated in subsection (a) . . . including . . . sales or use taxes on the sale of goods or services." *See Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986).

We believe the broad reading of § 1513(a) that Travel Services suggests would be inconsistent with the Supreme Court's interpretation of the statute in *Wardair*. Under that reading, every item paid from an airline's gross receipts, such as an airline's direct purchase of goods or services or an airline employee's wages, would be exempt from taxation. However, in *Wardair*, the Supreme Court held that a tax on aviation fuel sold to airlines was not preempted by § 1513(a), *see Wardair*, 477 U.S. at 7, without regard to whether the tax would ultimately be paid out of an airline's gross receipts derived from the sale of air transportation. Thus, we reject Travel Services' broad reading of § 1513(a).

Instead, we think that the commissions Travel Services receives from the airlines are commissions paid for the service of selling airline tickets. A tax on these commissions is not a tax on gross receipts from the sale of air transportation prohibited by § 1513(a); it is merely a tax on compensation paid for a service. Section 1513(b)

allows the Virgin Islands to impose taxes "other than those enumerated in [§ 1513(a)], including . . . sales or use taxes on the sale of goods or services." The Virgin Islands tax on Travel Services' commissions is not one of the enumerated taxes that § 1513(a) prohibits, and thus it is expressly allowed under § 1513(b).

The fact that the commissions are paid from the same account into which the gross receipts from the sale of airline tickets are deposited does not change the nature of the compensation. As the territorial court persuasively reasoned:

> The fact that [Travel Services] is paid from the same account in which the gross receipts from the sale of air transportation are deposited is irrelevant. Those receipts are not the property of [Travel Services]. The instant that a portion of those receipts is assigned, or paid to [Travel Services], the character of that portion is altered. It no longer represents "gross receipts derived from the sale of air transportation." It is now commissions for services rendered. This is so because its purpose is not for travel, but to compensate [Travel Services] for services rendered. The airlines, by paying commissions, surely are not purchasing air transportation. Obviously, this is not a transaction between an airline and a passenger, but rather it is a transaction between an airline and its travel agent.

Travel Services, Inc. v. Government of the Virgin Islands, Civil No. 204/87, slip op. at (V.I. Terr. Ct. June 23, 1988), *reprinted in* Appendix of Appellant (App.) at 30.

Travel Services argues that the tax on its commissions is an indirect tax on the sale of air transportation prohibited by § 1513(a). In support, Travel Services relies on *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983). However, *Aloha Airlines* did not speak to the issue this case raises. In *Aloha Airlines*, the Supreme

Court held that a state tax, denominated as a property tax on airlines measured by their gross receipts, was in reality a tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce. *See* 464 U.S. at 13-14. The Court held that § 1513(a) preempted such a tax. *See id.* at 14.

The Virgin Islands tax on Travel Services' commissions is distinct from the tax at issue in *Aloha Airlines*. The tax at issue in this case is a tax on income derived from services provided. It is not analogous to the property tax measured by airline gross receipts, which the Supreme Court held was preempted in *Aloha Airlines*.

Travel Services also argues that the Virgin Islands tax on travel agents' commissions is not a tax on income derived from services permitted under 49 U.S.C.A. § 1513(b). In support of this argument, Travel Services relies on *State ex rel. Arizona Dep't of Revenue v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980), and Ohio Op. Atty. Gen. No. 73-117 (1973). In *Cochise Airlines*, Arizona had imposed directly on an airline a privilege tax based on the volume of business. The Court of Appeals of Arizona held that § 1513(a) preempted the tax insofar as it related to the transportation of airline passengers. *See* 626 P.2d at 601. The Ohio Attorney General's opinion similarly concluded that § 1513(a) preempted an Ohio excise tax on airlines. Here, the territorial government of Virgin Islands is not imposing a privilege tax or an excise tax on airlines, but a tax on the commissions earned by a travel agent for providing services. In our view, the authorities Travel Services relies on are not controlling.

Because the tax at issue is a tax on commissions derived from services provided to airlines and not a tax on gross receipts from the sale of air transportation, § 1513(a) does not preclude the Virgin Islands from levying and collecting such a tax on Travel Services' commissions.

IV.

For the reasons stated above, we hold that § 1513(a) does not preempt the application of V.I. Code Ann. tit. 33, § 43(a) to impose a tax on the commissions earned by travel agents for the sale of airline tickets. We will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX
APPELLATE DIVISION

D.C. Civil No. 1988-264

T.C. Civil No. 204-1987

TRAVEL SERVICES, INC.,
Plaintiff/Appellant,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY OLIVE, Director of
V.I. BUREAU OF INTERNAL REVENUE,
Defendants/Appellees.

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On Appeal from the
Territorial Court of the Virgin Islands *

BEFORE: O'BRIEN,** Presiding Judge; McGLYNN, U.S. District Judge***, and SMOCK, Territorial Court Judge

OPINION

The issue presented is whether 49 U.S.C.A. § 1513 (Supp. 1988) permits the Government of the Virgin Islands to tax the commissions earned by travel agents on the sale of airline tickets. The Territorial Court concluded that it does. We affirm.

I.

The Government of the Virgin Islands assessed plaintiff-appellant Travel Services, Inc., doing business as Southerland Tours (hereafter "Southerland"), a deficiency for failure to pay gross receipts taxes [1] on com-

* This matter was submitted on the briefs of the parties, pursuant to V.I. Code Ann. tit. 5, App. VII R. 12(6) (Supp. 1988).

** The Honorable David V. O'Brien has recused himself from consideration of this appeal.

*** The Honorable Joseph L. McGlynn is sitting by designation from the U.S. District Court of Pennsylvania.

[1] V.I. Code Ann. tit. 33, § 43 (Supp. 1988) provides:

> (a) Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay tax of four percent (4%) on the gross receipts of such business. . . .
>
> (b) The term "gross receipts," as used in this title shall mean all receipts, cash or accrued, of the taxpayer for services or derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or services, or both, including rentals, fees and other involvements, however,* designated . . . .

* So in original.

missions earned on the sale of airline tickets. Southerland maintained that federal law, 49 U.S.C.A. § 1513(a), prohibits defendants from taxing those commissions. The parties entered into a stipulation of facts and both moved for summary judgment. The Territorial Court denied Southerland's motion, granted defendants' motion, and entered judgment in favor of defendants. Southerland appeals from that judgment.

49 U.S.C.A. § 1513 provides in pertinent part:

> (a) *No* state ([or *Territory*] including . . . the Virgin Islands . . .) *shall* levy or *collect a tax*, fee, head charge, or other charge, *directly or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or *on the sale of air transportation* or on the gross receipts derived therefrom. . . .
>
> (b) [*N*]*othing in this section shall prohibit a State* ([or Territory] including . . . the Virgin Islands . . .) *from the* levy or *collection of* taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or *use taxes on the sale of* goods or *services*. . . .

Id. (emphasis added). Southerland contends that its commissions are proceeds derived "from the sale of air transportation" and, as such, cannot be taxed by the defendants. 49 U.S.C.A. § 1513(a). Defendants, however, claim that the tax on commissions is a tax on services and is explicitly permitted by 49 U.S.C.A. § 1513(b).

II.

Southerland is a full service travel agency which, among other things, sells air transportation for approximately sixty airlines. Pursuant to an agreement with the Agent Reporting Plan (ARP), a corporation, all pro-

ceeds from the sale of air transportation are deposited into Southerland's account. These proceeds belong to the airlines and are not property of Southerland. ARP draws from that account all amounts except those representing commissions earned by Southerland.

The Territorial Court focused on the *purpose* of the income and the *parties* involved. It concluded that the commission income is derived from the sale of a service and is, therefore, taxable. The court explained that

> careful scrutiny of Southerland's business operations reveals that it performs two activities with one act. It undeniably sells air transportation, and by so doing, it performs a service to airlines for a fee. Both activities, though related, are separate and distinct for tax purposes. The Virgin Islands seek to tax only one—the sale of a service.
>
> . . . .
>
> . . . [T]he character or classification of income for tax purposes, changes depending on its purpose and the parties involved. Southerland admits that the gross receipts which it collects from passengers are the property of the airlines. In this respect, Southerland is merely a conduit for payment of airline tickets. The purpose of the payment is for travel. Accordingly, these receipts represent a transaction between the airlines and its passengers. Such receipts represents the sale of air transportation—the activity sought to be pre-empted by § 1513(a).
>
> The fact that Southerland is paid from the same account which the gross receipts from the sale of air transportation are deposited is irrelevant. Those receipts are not the property of Southerland. The instant that a portion of those receipts is assigned, or paid to Southerland, the character of that portion is altered. It no longer represents "gross receipts derived from the sale of air transportation." It is

> now commissions for services rendered. This is so because its purpose is not for travel, but to compensate Southerland for services rendered. The airlines, by paying commissions, surely are not purchasing air transportation. Obviously, this is not a transaction between an airline and a passenger, but rather it is a transaction between an airline and its travel agent.

Travel Services, Inc. v. Government of the Virgin Islands, Civ. No. 204-87 at 5-7 (Terr. Ct. St. Croix June 23, 1988).

We agree with this conceptual analysis of the issue presented and will, consequently, affirm the Territorial Court's decision.

DATED this 18th day of Aug., 1989.

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF SAINT CROIX
APPELLATE DIVISION

D.C. Civil No. 1988-264

T.C. Civil No. 204-1987

TRAVEL SERVICES, INC.,
Plaintiff/Appellant,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY OLIVE, Director of
V.I. BUREAU OF INTERNAL REVENUE,
Defendants/Appellees.

ELLEN G. DONOVAN, ESQ.
55 Kings Alley
Christiansted, St. Croix
U.S. Virgin Islands 00820
—Atty. for Plaintiff-Appellant

GODFREY R. DE CASTRO, ESQ.
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ROSALIE SIMMONDS BALLENTINE
Solicitor General
JOSEPH E. WILLIAMS, ESQ.
Assistant Attorney General
Department of Justice
#46 Norre Gade
St. Thomas, Virgin Islands 00801
—Attys. for Defendants/Appellees

On Appeal from the
Territorial Court of the Virgin Islands*

BEFORE: O'BRIEN, ** Presiding Judge; McGLYNN, U.S. District Judge***, and SMOCK, Territorial Court Judge

JUDGMENT

Having considered the issue presented on appeal and having filed an opinion of even date herewith, it is hereby *ORDERED and ADJUDGED*:

THAT the judgment of the Territorial Court is AFFIRMED.

DATED this 18th day of Aug., 1989.

FOR THE COURT:

/s/ David V. O'Brien
DAVID V. O'BRIEN
Chief Judge

ATTEST: ORINN ARNOLD
Clerk

by: Margaret Richards
Deputy Clerk

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* This matter was submitted on the briefs of the parties, pursuant to V.I. Code Ann. tit. 5, App. VII R. 12(6) (Supp. 1988).

** The Honorable David V. O'Brien has recused himself from consideration of this appeal.

*** The Honorable Joseph L. McGlynn is sitting by designation from the U.S. District Court of Pennsylvania.

APPENDIX C

IN THE TERRITORIAL COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. CROIX: KINGSHILL

Civil No. 204/87

ACTION FOR DETERMINATION OF TAX

TRAVEL SERVICES, INC.,
Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY P. OLIVE, Director of the
Virgin Islands Bureau of Internal Revenue,
Defendants.

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(809) 774-5666
(Attorney for Government)

PETERSEN, Judge

MEMORANDUM OPINION AND ORDER

June 23, 1988

This matter is before the Court on motions for summary judgment filed by both parties on June 1, 1988. These motions present this Court with a novel issue: Whether 49 USC § 1513(a) pre-empts the Virgin Islands Gross Receipts Tax Statute, to the extent that it imposes a tax on the gross receipts of travel agencies. For the reasons mentioned below, this Court concludes that the territorial statute is not pre-empted.

FACTS

Plaintiff, Travel Services, Inc., is a corporation doing business in the Virgin Islands under the trade name of Southerland Tours (hereinafter referred to as Southerland). Southerland is a full service travel agency whose activity includes arranging and selling air transportation, hotel accommodations, land tours, cruises, land transportation, and car rentals. Pursuant to agreements with International Airlines Travel Agent Network (IATAN) and Agent Reporting Plan (ARP, Southerland sells tickets for approximately sixty airlines. The ticket stock, travel documents, and airline plates given to travelers are the property of the airlines. Southerland does not own or operate aircrafts. IATAN and the various airlines impose certain standards, terms, and conditions to which Southerland must adhere when arranging and selling air transportation. Southerland, for example, cannot alter the price of an airline ticket. It also cannot give refunds without written instructions from the airlines. Employees of Southerland are trained by the airlines in the same fashion as airline employees. This insures that air transportation is sold to the public at the same fares and under the same terms, conditions, and restrictions whether purchased directly from an airline or through a travel agency.

Under Southerland's agreement with ARP, all proceeds from the sale of air transportation are deposited in Southerland's account. These proceeds belong to the airlines and are not the property of Southerland. ARP draws all amounts from this account, except an amount which represents commissions earned by Southerland.

Title 33 of the Virgin Islands Code imposes a tax of four percent on the gross receipts of all corporations doing business in the Virgin Islands. 33 V.I.C. § 41 and § 43. In 1973, Congress enacted 49 USC § 1513(a) which prohibited the Virgin Islands from collecting a gross receipts tax on the sale of air transportation, or on the gross receipts derived from such sale. Consequently, defendant, Director of Internal Revenue Bureau, took the position that the Bureau will not collect gross receipts taxes from airlines, but will continue to collect such taxes from travel agencies. Thus, if an agency sells a ticket for $100 and earns a commission of $10 the Director will tax the $10.

Pursuant to 33 V.I.C. § 43, plaintiff filed monthly gross receipts tax returns for the period of June 1983 through April 1986. Upon conducting an examination of these returns, the Director determined that Southerland had omitted a total of $1,655,026.16 from its monthly gross receipts. This amount, derived from a profit and loss statement, represented commissions earned for selling air transportation. The Director assessed a deficiency in Southerland's gross receipts tax for the periods mentioned of $44,377.02 and $10,399.43 as interest. Southerland objected to the tax and filed the instant action alleging that the Virgin Islands tax was pre-empted by 49 USC § 1513(a). Both parties filed motions for summary judgment and thoroughly briefed the relevant issues.

DISCUSSION

These motions for summary judgment require the Court to decide whether 49 U.S.C. § 1513(a) pre-empts

the Virgin Islands Gross Receipts Tax Statute to the extent that it imposes a tax on the gross receipts of travel agencies.

This Court must commence its analysis with the language employed by Congress as the legislative purpose is generally reflected in the ordinary meaning of the words used. *American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534, 1537 (1982). The relevant statute, 49 USC § 1513(a), reads as follows:

> No state (. . . including the Virgin Islands) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

This statute is alleged to pre-empt 33 V.I.C. § 43(a) which reads as follows:

> (a) Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay a tax of four percent (4%) on the gross receipts of such business . . .

It is evident that 49 U.S.C. § 1513(a) prohibits the Virgin Islands from taxing, directly or indirectly, the sale of air transportation or the gross receipts derived from such sale. The narrow, yet critical, issue, however, is whether the commissions received by a travel agency can properly be classified as gross receipts derived from the sale of air transportation.

This Court will proceed, bearing in mind the well settled rule that statutory exemptions are a matter of legislative grace and as such, are narrowly and strictly construed. *Bingler* v. *Johnson*, 89 S.Ct. 1439, 1445 (1969); *King Christian Enterprises, Inc.* v. *Government*, 5 V.I. 170, 178 (3rd Cir. 1965). The aim of any taxing scheme is to tax activities or events. In this case the activity

sought to be taxed is veiled. On its face, Southerland's activities appear to be protected by § 1513 (a). However, careful scrutiny of its business operations reveals that it performs two activities with one act. It undeniably sells air transportation, and by so doing, it performs a service to airlines for a fee. Both activities, though related, are separate and distinct for tax purposes. The Virgin Islands seek to tax only one—the sale of a service.

Southerland argues that its commissions represent a portion of collected airfares and, therefore, the commissions are part of "gross receipts derived from the sale of air transportation." If this were true, a surtax on the gross salary of airline ticket agents would be prohibited, so long as the agents were paid from the airlines' sales account. Unfortunately, escape from taxation is not that simple. It is interesting to note that the collected airfares, which represent "gross receipts derived from the sale of air transportation," are not the property of Southerland. Surely, Southerland would not report as income, gross receipts which are not theirs. But the unreported gross receipts discovered by the Director came from Southerland's books and records. Thus, shouldn't these receipts represent something else?

It is true that all receipts from the sale of air transportation by Southerland are deposited in a central APR account and that Southerland's commission is paid therefrom. What Southerland fails to recognize, however, is that the character or classification of income for tax purposes, changes depending on its purpose and the parties involved. Southerland admits that the gross receipts which it collects from passengers are the property of the airlines. In this respect, Southerland is merely a conduit for payment of airline tickets. The purpose of the payment is for travel. Accordingly, these receipts represent a transaction between the airlines and its passengers. Such receipts represent the sale of air transportation—the activity sought to be pre-empted by § 1513(a).

The fact that Southerland is paid from the same account in which the gross receipts from the sale of air transportation are deposited is irrelevant. Those receipts are not the property of Southerland. The instant that a portion of those receipts is assigned, or paid to Southerland, the character of that portion is altered. It no longer represents "gross receipts derived from the sale of air transportation." It is now commissions for services rendered. This is so because its purpose is not for travel, but to compensate Southerland for services rendered. The airlines, by paying commissions, surely are not purchasing air transportation. Obviously, this is not a transaction between an airline and a passenger, but rather it is a transaction between an airline and its travel agent. This Court cannot consider this transaction as the activity sought to be pre-empted by § 1513(a). The statute "pre-empts state taxes imposed on or measured by the gross receipts of airlines," not state taxes imposed on travel agencies whose income doesn't represent such receipts. *Aloha Airlines* v. *Director of Taxation of Hawaii*, 104 S.Ct. 291, 295 n.10 (1983).

The cases cited by Southerland in support of its position are inapposite. They involve attempts to tax an airline of its sale of air transportation. Here the Virgin Islands is taxing the sale of a service provided by travel agencies.

This Court's distinction between the sale of air transportation and the sale of services is not unique. The United States District Court in *Salem Transportation Co.* v. *Port Authority of N.Y. & N.J.*, 611 F. Supp. 254, 257 (D.C.N.Y. 1985) distinguished between the activity of carrying passengers in air transportation and that of selling ground transportation services. It said, "Congress passed § 1513(a) to deal primarily with local head taxes on airline passengers. (citations omitted) The section was not passed to prohibit the imposition of fees on ground transportation service." *Id.* at 257. Though these

activities are very much related, the Court recognized their distinction for tax purposes. Similarly, in *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 106 S.C. 2369, 2372 (1986), the Supreme Court upheld a tax on an airline for fuel consumed. The Court stated that Congress did not intend to preclude state sales taxation of airline fuel. Thus the Court recognized that an activity, though indispensable to the sale of air transportation or the carriage of persons therein, was nevertheless sufficiently distinct to be taxable.

Congress itself manifested an intent to distinguish between the sale of air transportation and the sale of other goods and services when it enacted § 1514(b). That statute reads as follows:

> Nothing in this section shall prohibit a State (. . . including the Virgin Islands) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes . . . sales taxes . . . on the sale of goods or services; . . .

Clearly, "sale of goods or services" as used in § 1513(b) is not intended to include the sale of air transportation (i.e. a service). If it did, § 1513(b) would contradict § 1513(a). See *State* v. *Cochise Airlines*, 626 P.2d 596, 601 (Ariz. App. 1980). Thus, Congress itself has made it clear that it is only the sale of a particular service, that being air transportation, that is pre-empted. Related services remain taxable.

It is rather vivid to this Court that the plain language of § 1513(a), strictly construed, does not prohibit the imposition of gross receipts taxes on the commissions earned by travel agencies. This reading becomes even more apparent when one examines the Virgin Islands tax in light of the history and purpose of § 1513(a). In 1970, Congress passed the Airport and Airway Development Act in order to provide for needed improvements in the

national air transportation system. A Trust Fund was established as a conduit to channel federal resources to local airport improvement and expansion projects. See 1973 U.S. Code Cong. & Admin. News, pgs. 1434-1437. The Fund was financed through federal aviation taxes, including a 8% charge on domestic passengers, and a $3 per person charge on international trips. *Id.* at 1450.

In 1972, the Supreme Court upheld passenger head taxes imposed by the states of New Hampshire and Indiana. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 92 S.Ct. 1349 (1972). The decision invited state and local governments to impose similar taxes on air travelers. U.S. Code Cong. & Admin. News, supra, at 1446. Congress later concluded that "the proliferation of local taxes burdened interstate air transportation, and when coupled with the federal Trust Fund review, imposed double taxation on air travelers." *Aloha*, 104 S.Ct. at 293. To rectify this problem, Congress passed 49 USC § 1513(a).

Section 1513(a) was passed "to deal primarily with local head taxes on airline passengers." 104 *S.Ct.*, at 294. It also sought to "pre-empt state taxes on the gross receipts of *airlines*." (Emphasis supplied). *Id.* at 294. Congress was concerned with the increase in airfares which would occur for example, if an airline was taxed on its sales. The airline would simply increase its fares. U.S. Code Cong. & Admin. News, supra, at 1451. Southerland is powerless to pass on gross receipts by increasing airfares. The tax, therefore, is not at odds with the purpose of § 1513(a). Conspicuously absent from the legislative history of § 1513(a) is any intent to pre-empt taxation of travel agencies. The history abounds with references to airlines and air passengers. The activity performed by travel agencies was never mentioned. As the Supreme Court in *Wardair* stated:

> Where a congressional statute does not expressly declare that a state law is to be pre-empted, and

> where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by state law.

Wardair, supra, at 2372. No such conflict or congressional intent exists here.

For the foregoing reasons, this Court holds that 49 USC § 1513(a) does not pre-empt the Virgin Islands Gross Receipts Tax Statute with respect to commissions earned by travel agencies. The Government's Motion for Summary Judgment will be granted, and the Plaintiff's Motion for Summary Judgment will be denied.

/s/ Eileen R. Petersen
EILEEN R. PETERSEN
Judge

APPENDIX D

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF SAINT CROIX

Civil No. 204/87

ACTION FOR DETERMINATION OF TAX

TRAVEL SERVICES, INC.,
Plaintiff,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS and ANTHONY P. OLIVE, Director of Virgin Islands Bureau of Internal Revenue,
Defendants.

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto and incorporated in this stipulation and made a part hereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated. Either party hereby expressly reserves the right to object to the admission in evidence of any of the following facts or exhibits, however, on the grounds or materiality and relevancy.

1. Travel Services, Inc. (hereinafter Plaintiff), is a corporation duly organized and exiting under the laws of the United States Virgin Islands.

2. Plaintiff operates a travel agency known as Southerland Tours located at #55 Kings Alley, Christiansted, St. Croix, United States Virgin Islands.

3. Plaintiff's principal place of business is located in Christiansted, St. Croix, United States Virgin Islands.

4. Plaintiff filed its monthly gross receipts tax returns (Form 720 V.I.) for the periods June 1983 through April 1986 with the Virgin Islands Bureau of Internal Revenue at St. Croix.

5. Plaintiff's employer identification number (EIN) is 67-025714.

6. On January 30, 1987, the Director of the Virgin Islands Bureau of Internal Revenue assessed gross receipts taxes and interest on the commissions earned by Plaintiff from the sale of airline tickets for the months of June 1983 through April 1986 in the amounts of $44,377.02 and $10,399.43 respectively.

7. Plaintiff is engaged in business as a travel agency.

8. As a travel agency, Plaintiff's services include providing airline tickets for sale.

9. Plaintiff has an arrangement with certain airline carriers whereby Plaintiff will issue an airline ticket for a customer to his or her place of destination.

10. The price of the airline ticket cannot be lowered or increased by Plaintiff under any circumstances.

11. Plaintiff remits the entire ticket fare to an account in Plaintiff's name from which the airline reporting plan draws checks for all fares less the balance of commission owed which remains in Plaintiff's account.

12. In the sale of tickets, Plaintiff acts as the agent of airline.

13. The fares for airline tickets collected by Plaintiff are not the property of the Plaintiff.

14. Plaintiff holds the collected air fares in trust for the various air carriers.

15. In filing its monthly gross receipts tax returns for the months of June 1983 through April 1986, Plaintiff did not report as gross receipts these amounts earned as commissions from the sale of airline tickets.

16. In examining Plaintiff's monthly gross receipts tax returns, Defendant determined that Plaintiff had excluded from its monthly gross receipts for the months of June 1983 through April 1986, all commissions earned during said periods from the sale of airline tickets.

17. Attached hereto as Exhibit A is a summary of gross receipts and taxes prepared by Revenue Agent Bernadette Williams and corrected by Plaintiff.

DATED:

Government of the
Virgin Islands

GODFREY R. DE CASTRO
Attorney General

By: /s/ Eddie L. Gibson
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Dated: 3/14/88

EXHIBIT A

TRAVEL SERVICES, INC.

Gross Receipts

Period	A Per Gross VI	B Tax Paid	C Commission on Ticket Sale	D Total Gross Receipt	Exemption	Rate	Current Gross Receipt Tax	Difference
June 1983	$ 6,849.90	37.00	46,189.00	53,038.90	-0-	2%	1,060.77	1,023.78
July 1983	12,540.56	150.81	35,257.00	47,797.56	-0-	2%	955.95	805.14
Aug. 1983	5,388.94	7.77	46,209.00	51,597.94	-0-	2%	1,031.95	1,024.18
Sept. 1983	4,143.17	-0-	34,233.00	38,376.17	-0-	2%	767.52	767.52
Oct. 1983	11,608.91	132.18	25,284.00	36,892.91	-0-	2%	737.85	605.68
Nov. 1983	6,140.57	31.37	32,779.00	38,919.57	-0-	2.75%	924.33	901.52
Dec. 1983	12,119.25	195.78	39,503.00	51,622.25	-0-	2.75%	1,419.61	1,223.84
Jan. 1984	8,500.00	96.25	25,365.00	33,865.00	-0-	2.75%	931.28	835.03
Feb. 1984	8,836.73	105.51	29,305.00	38,141.73	-0-	2.75%	1,048.89	943.38
March 1984	9,300.00	118.25	33,900.00	43,200.00	-0-	2.75%	1,188.00	1,069.75
April 1984	10,827.74	160.26	38,650.00	49,477.74	-0-	2.75%	1,360.63	1,200.37
May 1984	10,464.59	150.27	36,682.00	47,146.59	-0-	2.75%	1,296.53	1,146.26
June 1984	11,165.53	169.55	50,472.00	61,637.53	-0-	2.75	1,695.03	1,525.48
July 1984	8,077.76	84.63	50,633.00	58,710.76	-0-	2.75%	1,614.54	1,529.91
Aug. 1984	6,121.51	30.84	42,875.00	48,996.51	-0-	2.75%	1,347.40	1,316.56
Sept. 1984	6,654.37	45.50	26,983.00	33,637.37	-0-	2.75%	925.03	879.54
Oct. 1984	4,292.48	-0-	34,878.00	39,170.48	-0-	3%	1,126.14	1,126.14
Nov. 1984	5,496.36	14.89	40,568.00	46,064.36	-0-	3%	1,381.93	1,367.04
Dec. 1984	6,267.63	38.03	48,028.00	54,295.63	-0-	3%	1,628.86	1,590.84
Jan. 1985	5,159.25	4.77	34,490.00	39,649.25	-0-	3%	1,189.47	1,184.70
Feb. 1985	10,073.63	152.21	27,722.00	37,795.63	-0-	3%	1,133.86	981.66
March 1985	4,568.24	-0-	34,878.00	39,446.24	-0-	3%	1,183.38	1,183.38
Apr. 1985	$ 8,572.66	107.18	35,282.00	43,854.66	-0-	3%	1,315.63	1,208.46
May 1985	17,168.75	365.06	46,224.00	63,392.75	-0-	3%	1,901.78	1,536.72
June 1985	11,785.46	202.66	52,377.00	64,132.46	-0-	3%	1,923.97	1,721.31
July 1985	18,613.05	408.39	53,622.00	72,235.05	-0-	3%	2,167.05	1,758.66
Aug. 1985	9,037.27	151.40	53,778.00	62,815.27	-0-	3.75%	2,120.00	1,968.61
Sept. 1985	7,048.61	76.82	29,889.00	36,937.61	-0-	3.75%	1,385.16	1,308.34
Oct. 1985	12,663.77	287.39	34,145.00	46,808.71	-0-	3.75%	1,755.32	1,467.94
Nov. 1985	4,769.57	-0-	41,452.00	46,221.57	-0-	3.75%	1,733.30	1,733.30
Dec. 1985	4,520.07	-0-	43,420.00	47,940.07	-0-	3.75%	1,797.75	1,797.75
Jan. 1986	7,573.08	96.49	33,100.00	40,673.08	-0-	3.75%	1,525.24	1,428.75
Feb. 1986	17,822.61	480.85	27,830.00	45,652.61	-0-	3.75%	1,711.97	1,231.13
Mar. 1986	7,164.38	81.16	37,219.00	44,383.38	-0-	3.75%	1,644.37	1,583.21
Apr. 1986	18,132.82	492.48	42,366.00	50,498.82	-0-	3.75	1,893.70	1,401.22
TOTALS	$319,439.16	$4,467.09	$1,335,587.00	$1,655,026.16			$48,844.19	$44,377.10

/s/ Bernadette C. Williams
BERNADETTE C. WILLIAMS
Internal Revenue Agent